IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SHERRIE ANN C.,

Plaintiff,

v. Civil Action No. 5:19-CV-1445 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on February 4, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: February 9, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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SHERRIE ANN C.,

Plaintiff,

vs. 5:19-CV-1445

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on February 4, 2021, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: Okay. Thank you. Let me begin by expressing my appreciation for excellent presentations, both written and verbal, I enjoyed working with you on this case.

I have before me a challenge to a determination by the Commissioner finding that plaintiff was not disabled within the relevant times and therefore ineligible for the benefits which she's sought. The background -- and the challenge is brought pursuant to 42 United States Code Sections 405(g) and 1383(c)(3).

The background is as follows: Plaintiff was born in September of 1970 and is currently 50 years old. She was 41 at the alleged onset of disability on April 28, 2012. Plaintiff lives in a trailer in Richland, New York with her son who by my calculations is now 19 years of age. She stands 5 foot 4 inches in height and weighs -- has weighed at various times between 140 and 155 pounds. Plaintiff has two children, they were 13 and 15 years old in August of 2012. She also, according to the records, was in an abusive relationship of approximately seven years with the father of her children. Plaintiff stopped attending high school in 10th grade and was in regular classes while she did attend. She did subsequently achieve a GED and went to college for approximately two years. Plaintiff has a driver's license

and owns a car. There is reference, including at page 713 of the administrative transcript, that she doesn't like driving due to panic attacks.

Plaintiff stopped working in April of 2010. Her past relevant work includes as a baby-sitter, census taker, school janitor, retail cashier, and a laborer. She worked for a significant period of time as a laborer in the floor business. She left that position when her boss retired, the owner of the business.

Physically, plaintiff suffers from arthritis, fibromyalgia, a history of reported seizures, a right shoulder injury which was exacerbated in May or early June of 2018 when she lifted a gate, that appears at page 248 of the administrative transcript. She also experiences degenerative disk disease of the lumbar spine, a history of Lyme disease, and hiccups extending over a period of time. Plaintiff underwent surgery in 2007 to repair a right leg fracture. She has for her shoulder and neck injury underwent, has undergone physical therapy, injections but no surgery. The plaintiff's right shoulder was x-rayed on June 8, 2018 and report is at page 730 of the administrative transcript. The finding was there minimal arthritis in the glenohumeral joint, moderate AC joint arthritis but no fractures or dislocations. Magnetic resonance imaging or MRI testing on June 11, 2018 was conducted. The findings were as follows:

"Multiple complex findings of the right shoulder include a 9-millimeter full-thickness or nearly full-thickness articular-sided anterior leading edge supraspinatus tendon tear overlying a relatively large anterior enthesopathic cortical erosion. The more posterior and medial rotator cuff exhibits tendonosis with tendon enlargement, interstitial mucoid degeneration, and undersurface fraying. There was a finding of intact rotator cuff and deltoid musculature, no bony overgrowth of the AC joint. There is a type I distal acromion morphology. No evidence of an AC joint or coracoclavicular separation but an edematous AC joint with an effusion and capsulitis could be associated with a symptomatic arthropathy. Suspected low-grade SLAP lesion. The long biceps tendon is torn and likely retracted. Low-grade subscapularis delaminating thinning without a full-thickness tear. Correlation for any biceps tendon dysfunction, pain at the biceps groove, or deformity at the upper arm is suggested." I should have practiced that before I read it.

Mentally, plaintiff has experienced depression, anxiety, panic disorder with agoraphobia, insomnia, and hallucinations. She receives health care treatment at Pulaski Health Care. Her primary is Nurse Practitioner Rachel Isabelle. She also has seen neurologist Ijaz Rashid. She sees orthopedists including Dr. Andrew Markwith and

Dr. Peter Vaneenenaam. And she sees Dr. Teresa Piotrowicz and LMSW Jennifer Koon approximately one time per month for her mental treatment.

Medications prescribed to the plaintiff include citalopram, Cymbalta, metazine, quistane, Xanax, Duloxetine, hydroxyzine, Risperdal, Naproxen, Mobic, Effexor, meloxicam, and gabapentin.

Plaintiff's activities of daily living include the ability to dress, bathe, groom, shop, do laundry, cook, clean, she sees friends, she cares for four dogs, she cares for or has cared for horses. There was an indication she may be giving the horse up. She gardens. Plaintiff smokes one pack of cigarettes per day and marijuana three times per week.

Procedurally, plaintiff applied for Title II benefits on July 11, 2016, and Title XVI benefits on July 21, 2016. There is indication that there were prior unsuccessful applications for Social Security benefits. In her applications in July 2016, she alleged an onset date of April 28, 2012 and claimed disability due to anxiety, depression, lesion on brain, growth on thyroid, hiccups for two years, water on knees, Lyme disease, and fibromyalgia.

A hearing was conducted on October 24, 2018 by Administrative Law Judge Kenneth Theurer. Administrative Law Judge Theurer issued an unfavorable decision on November 5,

2018. The Social Security Administration Appeals Council denied the request for review on September 24, 2019. This action was commenced on November 21, 2019 and is timely.

In his decision, ALJ Theurer applied the familiar five-step test for determining disability. He first noted that plaintiff's insured status ended on September 30, 2014.

At step one, he concluded plaintiff had not engaged in substantial gainful activity since April 28, 2012.

At step two, he found that plaintiff does suffer from severe impairments that impose more than minimal limitation on her ability to perform basic work functions, including degenerative disease of the lumbar spine, osteoarthritis, fibromyalgia, a history of seizures, depression, and anxiety.

At step three, ALJ Theurer concluded that none of plaintiff's conditions, either singly or in combination, meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations. Fibromyalgia was considered under Listing 14.09D and Social Security Ruling 12-2p. The mental components were examined under 12.04 and 12.06 and a finding was made that neither the B nor the C criteria of those listings are met. Plaintiff's lumbar spine condition was examined under Listing 1.04, and the history of seizures under Listing 11.02.

The administrative law judge next concluded that

plaintiff retains the ability to perform light work with physical and mental-related limitations. Physically, the limitation is she can occasionally lift and carry 20 pounds, frequently lift and carry 10 pounds, sit for up to six hours, stand or walk for approximately six hours in an eight-hour day with normal breaks, occasionally climb ramps or stairs, never climb ladders, ropes, or scaffolds, and can perform occasional balancing, stooping, kneeling, crouching, and crawling. She should avoid working in unprotected heights or in conjunction with dangerous machinery.

The mental-related limitations are as follows: She retains the ability to understand and follow simple instructions and directions, perform simple tasks with supervision and independently, maintain attention and concentration for simple tasks, regularly attend to a routine and maintain a schedule. She relates to and interacts with coworkers and supervisors to the extent necessary to carry out simple tasks, i.e., she can ask for help when needed, handle conflicts with others, state her own point of view, initiate or sustain a conversation and understand and respond to physical, verbal, and emotional social cues. But she should avoid work requiring more complex interaction or joint efforts with coworkers to achieve goals. She should have no more than occasional contact with coworkers, supervisors, and the public. Claimant can handle reasonable levels of simple

work-related stress in that she can make occasional simple decisions directly related to the completion of tasks in a stable, unchanging work environment.

Applying that residual functional capacity or RFC finding at step four, Administrative Law Judge Theurer concluded that plaintiff is incapable of performing her past relevant work as a sander/finisher which was performed at the heavy level and a child monitor at the medium level.

At step five, Administrative Law Judge Theurer initially noted that if plaintiff could perform a full range of light work, the finding of not disabled would be directed by the Medical-Vocational Guidelines set forth in the Commissioner's regulations and specifically Grid Rule 202.21. Noting additional exertional and nonexertional limitations that would erode the job base on which the Grids were predicated, he found based on the testimony of a vocational expert that notwithstanding her conditions and limitations, plaintiff is capable of performing jobs available in the national economy, including as a routing clerk, a cleaner, housekeeping, and an order caller and found that she was therefore not disabled at the relevant times.

The court's review in this matter of course is deferential. It is the task of the court to determine whether correct legal principles were applied and the determination is supported by substantial evidence defined as

such relevant evidence as a reasonable mind would find sufficient to support a conclusion. The Second Circuit has noted, including in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443 from the Second Circuit, June 29, 2012, that this is a very deferential standard even more stringent than the clearly erroneous standard that we are all familiar with. As the court went on to note in *Brault*, the substantial evidence standard means once an ALJ finds facts, we can reject those facts only if a reasonable fact finder would have to conclude otherwise.

Plaintiff in this case raises two basic contentions. One related to the step two finding which failed to acknowledge plaintiff's shoulder and neck injury as severe which would result, according to the plaintiff, in a limitation on her ability to reach; and secondly, she challenges the weighing of opinion evidence regarding plaintiff's mental health, including opinions from Dr. Piotrowicz, a treating source, and Dr. Grassl, an examining -- consultative examiner.

The -- I'll take the step two argument first. Of course, the governing regulations provide that an impairment or combination of impairments is not severe if it does not significantly limit plaintiff's physical or mental ability to do basic work activities. 20 C.F.R. Section 404.1521(a). That section goes on to describe what is meant by the phrase

basic work activities defining that term to include "the abilities and aptitudes necessary to do most jobs."

The step two requirement is *de minimus* and intended only to screen out the truly weakest of cases. *Dixon v. Shalala*, 54 F.3d 1019 at 1030, Second Circuit 1995. It is noted, however, that the mere presence of a disease or impairment or establishing that a person has been diagnosed or treated for a disease or an impairment is not by itself sufficient to establish a condition as severe. *Coleman v. Shalala*, 895 F.Supp. 50 at 53 from the Southern District of New York, 1995.

In this case, the plaintiff bears the burden at all steps up until step five, and including at step two, to establish the existence of a condition which meets the definition at step two, and significantly, it is plaintiff's burden to show that the condition has lasted or is expected to last at least 12 contiguous months. 42 United States Code Section 423(d)(1)(A) and 1382c(a)(3)(A). The administrative law judge rejected the shoulder condition at step two at page 21 of the administrative transcript relying principally upon 16F, which is the exhibit reflecting physical therapy as well as the fact that she works with horses and in a campground.

As the Commissioner -- as the plaintiff argues, it is noted that Dr. Lorensen, an examining consultant, issued

an opinion back in August of 2016 in which, pertinently, she found that plaintiff had a moderate limitation for bending, lifting, and reaching. That's at page 707 of the administrative transcript. So plaintiff has had an impairment of the shoulder certainly for more than 18 months -- 12 months, and clearly it was exacerbated by the injuries she experienced in May of 2018, late May or early June, the record is unclear. I think that the plaintiff, when you consider that the step two requirement is modest, I think the record supports the plaintiff has a limitation on her ability to perform basic work activities based on the shoulder and neck injury. The shoulder injury has been confirmed by objective testing including x-ray and MRI that I referenced earlier. The issue of course is the duration. The plaintiff's injury was in May of 2018. She testified on October 24, 2018, some five months later, that it was still an issue. On October 1, 2018, it is true at page 1110 -- 1104 to 1110 that she did not report any issue regarding her neck or shoulder to Nurse Practitioner Isabelle, but she did on September 27, 2018 reference shoulder pain and that she was in a lot of pain over the past two weeks, that's at 1111 to 1114. The -- I believe that there was error at step two. The real issue is whether it was harmless or not.

Of course the -- pivotal to the finding of no disability was the residual functional capacity determination

by the administrative law judge. A claimant's RFC represents a finding of the range of tasks she is capable of performing notwithstanding the impairments at issue. An RFC is determined and informed by consideration of all of the relevant medical and other evidence. To properly ascertain a claimant's RFC, an ALJ must assess plaintiff's exertional capacities and that would include the ability to reach, and of course the residual functional capacity finding must be supported by substantial evidence.

In this case, as the plaintiff has noted, all three jobs that the ALJ found plaintiff capable of performing require frequent reaching. That's for the cashier, cleaner, housekeeper, and routing clerk. Frequent reaching is defined as one-third to two-thirds of the time. I do acknowledge the Commissioner's -- the case that the Commissioner has cited that bears some similarity to this case, that being *Linda S. v. Commissioner of Social Security*, it is 5:18-CV-726, reported at 2019 WL 3387993, from the Northern District of New York. It was an opinion of Magistrate Judge, now Chief Magistrate Judge Andrew T. Baxter, issued on July 29, 2016. But I think in this case, there was error. I think that there was no limitation presented to the vocational expert regarding reaching, and I think there should have been and I think that is a failure on the part of the Commissioner to carry his burden at step five.

The plaintiff also raised a treating source argument. The opinions of treating sources and other medical sources are subject to, under the old regulations that do apply in this case, 20 C.F.R. Sections 404.1527 and 416.927. Treating sources of course are given special consideration under those regulations. The opinion of a treating physician regarding the nature and severity of an impairment ordinarily is entitled considerable deference, provided it is supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence. *Veino v. Barnhart*, 312 F.3d 578, 588, Second Circuit, 2002. Such opinions are not controlling, however, if they are contrary to other substantial evidence in the record including the opinions of other medical experts. Any conflicts arising in the form of medical evidence is a matter properly entrusted to the Commissioner.

If controlling weight is not given to a treating source opinion, the administrative law judge must consider several factors specified in those regulations. In the Second Circuit we refer to those sometimes as the *Burgess* factors. It is noted, however, that in most instances, the *Burgess* factors are not neatly laid out in administrative law judge decisions. The Second Circuit has noted that if that is -- that is not fatal if the court, reviewing the entire record and the administrative law judge's decision, is firmly

convinced that the treating source rule was not violated. *Estrella v. Berryhill*, 925 F.3d 90, that is from the Second Circuit Court of Appeals, May 2019.

So in this case, Dr. Chapman's opinion, a nonexamining consultant, was given great weight at page 26 of the administrative transcript. Clearly he's a specialist familiar with Social Security program, and his opinions can constitute substantial evidence. Now I don't agree with the plaintiff that the opinions of Dr. Chapman are stale because I didn't see in the record any evidence of significant deterioration in plaintiff's mental condition. Oddly, or based on the unique facts of this case, Dr. Chapman gave two opinions. One was given on October 6, 2013 and related to the period prior to the date of last insured status of September 30, 2014 and addressed the application for Disability Insurance benefits. The other was given on October 12, 2016 and it relates to the Title XVI application. They appear at Exhibits 1A and 2A in the administrative transcript.

When considering the period prior to the date of last insured status, Dr. Chapman concluded that there was insufficient evidence to properly rate severity of alleged psychiatric impairment or DLI in the past, that's at page 73. In the later opinion related to the Title XVI application, he first went through considering the B criteria, found a

moderate limitation in the activities of daily living, a mild limitation in maintaining social functioning, moderate limitation in maintaining concentration, but no episodes of decompensation each of extended duration, that's at page 81. In the mental RFC finding that appears at page 85, he concludes plaintiff retains the capacity to perform the basic mental demands of unskilled work.

I think that Dr. Chapman's opinion was properly weighed, but not necessarily against the opinions of Dr. Piotrowicz and Dr. Grassl. Dr. Piotrowicz issued an opinion on December 22, 2016, it is Exhibit 8F of the administrative transcript, that is extremely limiting. It contains several marked limitations which is defined as there is serious limitation in this area, individual cannot generally perform satisfactorily in this area, and some extreme limitations which is defined as there is major limitation in this area, there is no useful ability to function in this area. Significantly, one of the extreme limitations again applied by Dr. Piotrowicz is the ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. It is true that as a check box form, Dr. Piotrowicz' opinion is entitled to less weight. It is also true, as the administrative law judge noted, that on each occasion when Dr. Piotrowicz was asked to describe the medical/clinical

findings that support this assessment, that portion of the opinion was left blank. The administrative law judge noted that the opinions of Dr. Piotrowicz were inconsistent with the treatment notes from that provider, and that is certainly a proper consideration, Second Circuit reaffirmed that recently in *Medina v. Commissioner of Social Security*, 2020 WL 7418981 from December 18, 2020. The opinion was discounted also because it was based largely on self-reports, and I would say I acknowledge that that's a proper consideration based on *Merkley v. Commissioner of Social Security*, 2017 WL 4512448 from the Northern District of New York, October 10, 2017. However, I will also note I agree with plaintiff that self-reports are important, particularly in mental health cases. I don't think that necessarily the treating source rule was violated by consideration of Dr. Piotrowicz' opinions, but I note that it was not wholly rejected, it was given little weight and there's no explanation as to what parts were and were not considered by the administrative law judge.

Dr. Grassl's report, she is an examining consultant, or he I guess -- Corey Anne, it's a her. The administrative law judge actually found that plaintiff was more limited than Dr. Grassl concluded. I think that that was properly weighed.

The issue here really is the ability to perform

under stress and the ability to maintain a regular schedule. In terms of stress, I think the unskilled work in the RFC properly accounts for this limitation. The problem is maintaining a schedule. Dr. Piotrowicz, as I alluded to a moment ago, found an extreme limitation in this area. Dr. Grassl, who also examined the plaintiff, found a moderate limitation in this area, and yet there is a finding in the RFC that plaintiff was able to perform and maintain a regular schedule. The two examining, a treating source and an examining source disagree. I think that those should have been given more deference than Dr. Chapman, a nonexamining physician. So -- and unfortunately, the hypothetical posed to the vocational expert was based on the RFC which was erroneous and did not account for plaintiff's inability to perform while maintaining a schedule, and therefore I find that this is also error.

I don't find any persuasive evidence of disability and I will also say this was a very close case, so in the event I were to be confronted with an Equal Access to Justice Act application, I would not foreclose the ability of plaintiff to argue it, but I probably would find that the government's position is substantially justified in this case.

So in conclusion, I do find that the resulting determination was not supported by substantial evidence and I

think the matter should be remanded for a closer look at the shoulder injury and its effect on ability to perform basic work functions and the ability of plaintiff to perform while maintaining a regular schedule. So I will grant judgment on the pleadings to the plaintiff, remand the matter for further examination on these issues, and again, thank you both for excellent presentations. I hope you have a good day. Thank you.

MR. FLEMMING: Thank you, your Honor.

MS. SONIA: Thank you.

(Proceedings Adjourned, 11:52 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 4th day of February, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter